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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1928 19

No. 618 20

SAFE DEPOSIT AND TRUST COMPANY OF BALTIMORE, MARYLAND, APPELLANT,

vs.

THE COMMONWEALTH OF VIRGINIA

APPEAL FROM THE SPECIAL COURT OF APPEALS OF THE STATE OF VIRGINIA

FILED JANUARY 9, 1929

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INDEX

	Original	Print
Proceedings in supreme court of appeals of Virginia	1	1
Petition for appeal (omitted in printing)	1	
Order allowing writ of error and supersedeas	3	1
Record from circuit court of Accomack County	3	1
Order correcting assessments	3	1
Agreed statement of facts	8	4
Exhibit—Deed in trust, Lucius J. Kellam to Safe Deposit & Trust Co	11	5
Exhibit—Schedule of securities transferred under deed in trust	14	7
Statement as to bond	17	9
Clerk's certificate (omitted in printing)	18	
Proceedings in special court of appeals of Virginia	19	9
Argument and submission (omitted in printing)	19	
Opinion, Crump, J	20	9
Judgment (omitted in printing)	37	

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JANUARY 19, 1929

	Original	Print
Petition for rehearing	38	18
Order granting rehearing	42	20
Argument and submission (omitted in printing)	43	
Opinion, Crump, J., on rehearing	44	21
Judgment	60	30
Petition for appeal and assignment of error	61	30
Order allowing appeal and supersedeas	64	33
Bond on appeal (omitted in printing)	66	
Citation and service (omitted in printing)	67	
Stipulation re transcript of record	68	34
Triplicate certificate (omitted in printing)	70	
Statement of points to be relied upon and stipulation as to printing record	71	36

[fols. a-3]

IN SUPREME COURT OF APPEALS

ORDER ALLOWING WRIT OF ERROR

Writ of error and supersedeas awarded. Bond $1,500.00. November 23, 1926.

IN CIRCUIT COURT OF ACCOMAC COUNTY

TRUST COMPANY OF NORFOLK, VIRGINIA, and THE SAFE Deposit and Trust Company of Baltimore, Maryland, Guardian and Trustees for L. J. & E. P. Kellam,

v.

COMMONWEALTH OF VIRGINIA

ORDER CORRECTING ASSESSMENTS—April 26, 1926

This day came the Trust Company of Norfolk, Norfolk, Virginia, by Hugh C. Davis, Esq., its attorney, and the Safe Deposit and Trust Company of Baltimore, Maryland, by George L. Doughty, Esq., its attorney, and L. J. & E. P. Kellam, infants, by Mrs. Carrie P. Kellam, their guardian and next friend, by George L. Doughty, Esq., her attorney, and moved the Court to exonerate them from the payment of State taxes assessed against the Trust Company of Nor-
[fol. 4] folk and the Safe Deposit and Trust Company of Baltimore, sometimes called the Safe Deposit Company of Maryland and sometimes called the Safe Deposit and Trust Company of Maryland, Guardian and Trustees of L. J. & E. P. Kellam, which said assessments were made for the years 1921, 1922 and 1923 on the 12th day of January, 1925, and for the year 1924 on the 10th day of January, 1925, and which assessments for the year 1925 were made on the personal property book 1925, which assessments with penalty and interest amount in the aggregate to the sum of $1,054.77.

And, thereupon, the said plaintiffs moved the Court to exonerate them from the payment of the said State taxes

amounting to $1,054.77, as aforesaid, which motions were defended by Jeff. F. Walter, Esq., Commonwealth's Attorney of Accomac County, and E. Warren Wall, Counsel for the State Tax Commission.

And, it appearing to the Court that all the assessments complained of were made within two years prior to September 1st, 1926, and that the intangible personal property so assessed is the personal property as the same may have been changed by reinvestment, assigned and delivered by L. J. Kellam who died August 9th, 1920, to the Safe Deposit and Trust Company of Baltimore, Maryland, under a deed [fol. 5] in trust bearing date the 4th day of May, 1920, and the evidence of which intangible personal property has been continuously in Baltimore in the possession and under the exclusive control of the said Safe Deposit and Trust Company, Trustee, since May 4th, 1920, and no part of said evidence of said property has been in the State of Virginia at any time since May 4th, 1920, and that the said L. J. Kellam, by a certain other deed in trust, dated the 3rd day of May, 1920, assigned and delivered to the Trust Company of Norfolk, Norfolk, Virginia, certain evidences of intangible personal property upon certain trusts therein set out and the said Trust Company of Norfolk has regularly reported and paid the taxes upon the said intangible personal property held by it under the deed in trust to it bearing date of May 3rd, 1920, and that there is no connection between the Safe Deposit and Trust Company of Baltimore and the Trust Company of Norfolk and that neither has any interest or control of the property so assigned and delivered to the other, and that neither the Trust Company of Norfolk nor the Safe Deposit and Trust Company of Baltimore has been appointed and qualified as Guardian of the said L. J. and E. P. Kellam in the State of Virginia or elsewhere, the duly qualified Guardian of L. J. and E. P. Kellam in the [fol. 6] State of Virginia being their mother, Carrie P. Kellam.

And, it further appearing to the Court that the said L. J. Kellam, deceased, was a resident of the Commonwealth of Virginia and the County of Accomac at the time of his decease; that the said L. J. Kellam, and E. P. Kellam, infant children of the said L. J. Kellam, deceased, are residents of Accomac County, Virginia, and that Mrs. Carrie

P. Kellam, mother of the said infants and their duly qualified guardian, is a resident of Accomac County, Virginia, all of which facts are contained in an agreed stipulation of fact filed in this case and hereby made a part of the record or were admitted by counsel in open Court, all of which the Court certified to be the facts proven in this case.

Whereupon, it is considered by the Court that the assessment of intangible personal property held by the Safe Deposit and Trust Company of Maryland, Trustee for L. J. and E. P. Kellam is erroneously assessed to the Trust Company of Norfolk, Trustee for L. J. and E. P. Kellam, it is ordered that such assessment be corrected and that the name of the Trust Company of Norfolk be eliminated therefrom.

But the Court being further of opinion that all such in- [fol. 7] tangible property held under the trust aforesaid by the Safe Deposit and Trust Company of Baltimore, Maryland, for L. J. and E. P. Kellam is properly assessable with taxes by the Commonwealth of Virginia in Accomac County, it is ordered that the assessment aforesaid be amended and corrected so that the names of the corporation and persons assessed with such taxes read as follows: The Safe Deposit and Trust Company of Baltimore, Maryland, trustee for L. J. and E. P. Kellam, and Carrie P. Kellam, guardian of L. J. and E. P. Kellam, to which action of the Court in correcting the assessment aforesaid by eliminating from said assessment the name of the Trust Company of Norfolk, Virginia, the Commonwealth, by her attorney, duly excepted and prayed that her exception be noted of record, which is accordingly done.

And, to which action of the Court in holding the said trust fund held by the Safe Deposit and Trust Company of Baltimore, Trustees for L. J. and E. P. Kellam to be taxable in Virginia in the manner and form as above stated to the said Safe Deposit and Trust Company of Baltimore, Maryland, Trustee for L. J. and E. P. Kellam and Mrs. Carrie P. Kellam, Guardian for L. J. and E. P. Kellam, and the [fol. 8] said L. J. and E. P. Kellam, the said plaintiffs, by their attorney, duly excepted and prayed that their exception be noted of record, which is accordingly done.

And the said plaintiffs having intimated their intention of applying to the Supreme Court of Appeals of Virginia for a writ of error and *supersedeas* to this order, it is ordered that the effect of this order be suspended for a period of ninety days, provided, however, that the said plaintiffs, or someone for them, shall give bond in the sum of two thousand dollars conditioned according to law with surety to be approved by the Clerk of this Court.

IN CIRCUIT COURT OF ACCOMAC COUNTY

AGREED STATEMENT OF FACTS—Filed April 26th, 1926

It is stipulated and agreed that the taxes for the years 1921, 1922, 1923, 1924 and 1925 against the Trust Company of Norfolk and the Safe Deposit and Trust Company of Baltimore, Maryland, sometimes called the Safe Deposit Company of Maryland, and sometimes called the Safe Deposit and Trust Company of Maryland, Guardian and Trustees, L. J. and E. P. Kellam, were all made within two [fol. 9] years prior to September 1, 1926; that the intangible personal property so assessed is the personal property, as the same may have changed by reinvestments, assigned and delivered by L. J. Kellam, who died August 9, 1920, to Safe Deposit and Trust Company of Baltimore under a deed of trust bearing date the 4th day of May, 1920, and the evidences of which intangible personal property have been continuously in Baltimore in the possession and under the exclusive control of the Safe Deposit and Trust Company of Baltimore, Trustee, since May 4, 1920, and no part of the evidences of property has been in the State of Virginia at any time since May 4, 1920; that the said L. J. Kellam, by a certain other deed dated the 3rd day of May, 1920, assigned and delivered to the Trust Company of Norfolk, Norfolk, Virginia, certain evidences of intangible personal property, upon certain trusts therein set out, and the said Trust Company of Norfolk has regularly reported and paid the taxes assessed upon the said intangible personal property held by it under the trust to it bearing date May 3, 1920; that copies of both of the said

trust deeds are filed herewith and made a part hereof; that there is no connection between the Safe Deposit and Trust Company of Baltimore and the Trust Company of Norfolk, and that neither has any interest or control in [fol. 10] the property so assigned and delivered to the other, and neither the Trust Company of Norfolk nor the Safe Deposit and Trust Company of Baltimore has been appointed and qualified as Guardian of L. J. and E. P. Kellam in the State of Virginia, or elsewhere, the duly qualified Guardian of L. J. and E. P. Kellam in the State of Virginia being their mother, Carrie P. Kellam. Without waiving her objection to the admissibility of the following statement upon the ground that in the opinion of the Commonwealth the same is irrelevant and immaterial, it is agreed that the Safe Deposit and Trust Company of Baltimore has under the laws of Maryland regularly reported to the taxing authorities of the City of Baltimore and the State of Maryland the said intangible property held by it under the trust aforesaid, bearing date May 4th, 1920, and regularly paid taxes assessed against said intangible property to the City of Baltimore and the State of Maryland.

Dated at Accomac, Virginia, this 21st day of April, 1926.

Trust Company of Norfolk, by Hugh C. Davis, Its Attorney. Commonwealth of Virginia, by E. [fol. 11] Warren Wall, Counsel State Tax Commission. Safe Deposit & Trust Company of Baltimore, by George L. Doughty, Its Attorney. Jeff F. Walter, Attorney for the Commonwealth, Accomac County, Virginia.

EXHIBIT TO AGREED FACTS

Copy of Deed in Trust Filed April 26th, 1926

Know all men by these presents that I, Lucius J. Kellam of Belle Haven, Virginia, in consideration of my love and affection for my children, hereinafter named, and in further consideration of the sum of One Dollar and of the assumption by the Safe Deposit and Trust Company of Baltimore of the trusts herein declared, do hereby transfer and

deliver unto the said Safe Deposit and Trust Company of Baltimore for the uses and trust purposes hereinafter declared, the securities enumerated on the schedule hereto attached and made part hereof.

[fol. 12] To be held by said Safe Deposit and Trust Company of Baltimore upon trust to collect the income arising therefrom and after paying such taxes as may be chargeable thereon and its 5% commissions on the gross income, to accumulate the the net income for the benefit of the two sons of myself, that is to say, Lucius J. Kellam, Jr., who attained the age of eight years on September 25, 1919, and Emerson Polk Kellam, who attained the age of five years on February 5, 1920, and when the said Lucius J. Kellam, Jr., arrives at twenty-five years of age, to deliver to him one-half of the principal of the estate hereby conveyed and one-half of the said accumulations of income—the other half of the said principal and accumulations of income shall be retained by said Trustee and all income therefrom shall continue to be accumulated until the said Emerson Polk Kellam arrives at twenty-five years of age when he shall become entitled to the said one-half of the principal and accumulations so retained together with all further accumulations thereon. If either of said two sons shall die before receiving his share of said pricipal and accumulations, then the same shall be paid over and delivered to his children living at his death; and if either shall die before receiving his share without issue, then such share shall be added to [fol. 13] the share of the survivor and be held for his use and benefit in the same manner precisely as his original share is held. If as said children arrive at twenty-five years of age, I shall be then living, then and in that event I reserve to myself the right to postpone the delivery to them of their share of said trust funds, principal and income provided I shall, prior to the delivery thereof, notify said Trustee to postpone such delivery, and provided also that I shall have the right, and which said right I hereby reserve, to revoke this trust in whole or in part at any time before the delivery of the principal and accumulations to my said children or either of them and in that event said Trustee shall reconvey with [illegible] accumulations as I may demand, and thereupon the [illegible]t hereby created shall cease to the extent of the pro[illegible] so reconveyed to me; and I

reserve to myself also the right to alter and change the trusts hereby created.

Power is hereby conferred upon said Trustee to vary and change the investments hereof as often as it may deem best and full power is conferred upon it to invest said accumulations. In my lifetime said Trustee shall make no change in any of the investments now turned over to it, [fol. 14] without my written approval.

To facilitate the transfer of registered securities, said Trustee is authorized to have the same registered in its name solely.

Witness my Hand and Seal this 4th day of May in the year nineteen hundred and twenty and the corporate seal and signature of the Vice-President of the said Trust Company to evidence its receipt of said securities and the acceptance by it of the trusts herein stipulated.

In duplicate.

Lucius J. Kellam. (Seal.) Safe Deposit & Trust Company of Baltimore, by Fred W. Marshall, Vice-President.

Test: George L. Doughty, Jr.
Attest: —— Gibson, Secretary.

EXHIBIT TO AGREED FACTS

Schedule of Securities Transferred to Safe Deposit and Trust Company of Baltimore, Trustee under Deed of Trust from Lucius J. Kellam Dated May 4, 1920

[fol. 15]

$2,000 Amer. Tel. & Telegraph Co. 6% conv. Gold Bonds due Aug. 1, 1925, Nos. 9631 and 11831 with Aug., 1920, etc. coupons attached.

2,000 Interborough Rapid Transit Co. secured conv. 7% gold Notes due Sept. 1, 1921, Nos. M22467/8 with Sept., 1920, etc. coupons attached.

5,000 Green Star Steamship Corp. 7% Equip. skg. fund 1st mortgage bonds due Dec. 1, 1924, Nos. T1842/1846 (temp. cfts.) no coupons attached.

1,000 Midland Timber Co. collateral trust serial 6% gold bond due Jan. 20, 1922, No. 298 with July 20, 1920, etc. coupons attached.

1,000 Davidson Sulphur & Phosphate Co. 1st mtge. 6% gold skg. fund bond due 1927 No. 2363 with Sept., 1920, etc. coupons attached.

1,000 Cosden & Co. conv. skg. fund 6% bond due 1932 No. 3963 Ser. "A" with July, 1920, etc. coupons attached.

1,000 E. P. Burton Lumber Co. 1st mtge. 6% gold bond due Feb. 1, 1922, No. 95 with Aug. 1, 1920, etc. coupons attached.

[fol. 16]

7,000 West India Sugar Finance Corp. sec. skg. fund 7% gold bonds due June 15, 1929, Nos. M3288, M3290, M3292/6, with June, 1920, etc. coupons attached also one subscription warrant for new securities which may be issued attached to each $1,000 bond.

$4,000 United States of America 2nd Liberty Loan 4¼% bonds due 1942 Nos. 14376/9 ex. May 15, 1920 coupons.

500 United States of America 3rd Liberty Loan 4¼% bonds due 1928 Nos. 661443 no coupons on bond.

500 United States of America 4th Liberty Loan 4¼% bond due 1938 No. 639904 with Oct. 15, 1920, coupons.

10 shares Columbia Graphaphone Mfg. Co. pfd. Stock. (Delaware Co.)

50 shares The Jones & Lamb Co. prior preference shares.

100 " Manufacturers Finance Co. pfd.

14 " Baltimore Tube Co. Inc. pfd.

15 " United States Fidelity & Guaranty Co.

10 " W. H. McElwain Co. 1st pfd.

20 " The Blumberg Bros. Co. 1st pfd.

[fol. 17]

200 " Pennsylvania Railroad Co.

" " Cosden & Co. conv. skg. fund 6% gold bond due 1932, No. 2025 ser.

1,000 "B" with July, 1920, etc. coupons attached.

L. J. Kellam.

(Copy of Deed of Trust to Trust Company of Norfolk Omitted.)

STATEMENT AS TO BOARD

The bond required by the order entered April 26th, 1926, herein was duly executed on the 28th day of June, 1926, by Safe Deposit and Trust Company of Baltimore, Trustee under deed of trust from Lucius J. Kellam, and Carrie P. Kellam, Guardian for L. J. and E. P. Kellam, principals, and Carrie P. Kellam and George L. Doughty, sureties, before the Clerk of the Circuit Court for the County of Accomac, the said sureties being deemed sufficient by the said Clerk.

John D. Grant, Jr., Clerk.

[fols. 18 & 19] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 20] IN SPECIAL COURT OF APPEALS

TRUST COMPANY OF NORFOLK, VIRGINIA, et als.

v.

COMMONWEALTH OF VIRGINIA

Circuit Court of Accomac County

OPINION BY JUDGE BEVERLEY T. CRUMP, PRESIDENT

Richmond, Va., March 1, 1928.

On May 4th, 1920, Lucius J. Kellam domiciled in Virginia, and a resident of Accomac county, executed an instrument in the form of a deed of trust, to the Safe Deposit and Trust Company of Baltimore, Maryland, by which he settled upon his two sons as beneficiaries certain securities valued at approximately $50,000.00, and listed in a schedule attached to the deed. The securities, consisting of stocks and bonds, were delivered to the trustee, and the deed provided that insofar as they were registered, the trustee was authorized to have them registered in its name, in order to

facilitate transfers for reinvestment or in the course of the execution of the trust.

The trustee was directed to collect the income upon the corpus of the property, and after paying to itself 5% commissions on the gross income and paying such taxes "as may be chargeable" on the property, the trust fund and the income were to be held upon trusts, which may be sum- [fol. 21] marized thus:

(1) The income was to be allowed to accumulate and so become a part of the corpus, until the two sons of the assignor, Lucius J. Kellam, Jr., then eight years of age and Emerson Polk Kellam, then five years old, should respectively attain the age of twenty-five years.

(2) When the older son reached the age of twenty-five years one-half of the entire fund then on hand, original principal and accumulations, was to be delivered to him as his property. As the younger son attained the same age the balance of the entire fund should be delivered to him.

(3) If either of said two sons should die before receiving his share, leaving children living at his death, then his share was to be paid over and delivered to the children; otherwise if the one so dying left no children living at his death, his share of the fund should accrue to the survivor, who would thereupon become entitled to the entire fund when he became twenty-five years of age.

(4) The maker of the deed of trust reserved to himself the right to alter, or to cancel and invalidate, the entire [fol. 22] trust provision in these further stipulations:

"If as said children arrive at twenty-five years of age, I shall be then living, then and in that event I reserve to myself the right to postpone the delivery to them of their share of said trust funds, principal and income provided I shall, prior to the delivery thereof, notify said trustee to postpone such delivery, and provided also that I shall have the right, and which said right I hereby reserve, to revoke this trust in whole or in part at any time before the delivery of the principal and accumulations to my said children or either of them and in that event said trustee shall reconvey to me such part or the whole of the estate hereby conveyed with its accumulations as I may demand, and

thereupon the trust hereby created shall cease to the extent of the property so reconveyed to me; and I reserve to myself also the right to alter and change the trusts hereby created."

The donor further retains his control of the fund by having the deed provide that "in my lifetime said trustee shall make no change in any of the investments now turned over to it, without my written approvel;" although full power had been conferred upon the trustee to change the investments as their judgment might dictate.

[fol. 23] The non-resident trustee signed the deed, accepted the trust, and the securities have been at all times since in its possession in the city of Baltimore.

Mr. Kellam, the grantor in the deed, died at his residence in Accomac county August 9, 1920, three months after the trust was created.

The trustee in Baltimore regularly reported the intangible personal property constituting the trust fund to the taxing authorities in Maryland, and paid the State and city taxes there assessed against it.

In the year 1925 the trust fund was assessed for taxation in Virginia by the assessors in Accomac county for the years 1921, 1922, 1923 and 1924 and placed upon the books for 1925, the assessments for these years, with penalties and interest, amounting to $1,054.77.

In April 1926 the Baltimore trustee applied to the Circuit Court for a correction of these assessments, and insisted that the fund held by it was not taxable in Virginia. The court held that the fund was taxable in this State and ordered it to be assessed against "The Safe Deposit and [fol. 24] Trust Company of Baltimore, Maryland, trustee for L. J. and E. P. Kellam, and Carrie P. Kellam, guardian of L. J. and E. P. Kellam." Mrs. Kellam had qualified as guardian of the two children upon the death of her husband. Upon the petition of the trustee and of the guardian a writ of error was allowed.

Objection is made on behalf of the Commonwealth, to the consideration by this court of an agreed statement of facts and copies of two deeds found in the record, because they are not identified by the trial judge in a bill of exceptions, or otherwise.

The order of the court refers to the agreed statement of facts and in express terms files it as part of the record. The agreed statement of facts recites as to two deeds of trust "that copies of both of the said trust deeds are filed herewith and made a part hereof;" one of these deeds was the deed of trust in question. The order further recites that the plaintiffs in error duly excepted to the adverse ruling of the court. These papers were necessarily made a part of the record by the order of the court, and no bill of exception was necessary. The function of a bill of exceptions is to put into a record something which does not appear in the court proceedings to have been made part of the record.
[fol. 25] The question to be decided is whether the corpus of the trust fund is taxable in Virginia, and if so to whom it should be assessed.

The applicable statute is section 2307 of the Code of Virginia as amended in 1920 and in 1922. It is there provided that if property consists of bonds and stocks in any county or city other than that of the owner's residence, or in a State other than Virginia, it shall be listed by and taxed to the owner, thus fixing the situs of such intangible property for the purpose of assessing the tax.

As to whom it should be assessed and taxed, this statute provides: "If property be owned by a person sui juris, it shall be listed by and taxed to him. If property be owned by a minor, it shall be listed to and taxed by his guardian or trustee, if any he has; if he has no guardian or trustee, it shall be listed by and taxed to his father, if any he has; if he has no guardian nor trustee, father nor mother, it shall be listed by and taxed to the person in possession." It is then provided that in case of a trust for an adult or a married woman, the property shall be assessed to the trustee if "any they have in this State"; otherwise it shall be [fol. 26] listed to the persons themselves. There is no requirement that in a case of a non-resident trustee for a minor, the property may not be assessed to the trustee.

The proper construction, and the true meaning and effect of the deed, presents no great difficulty.

The complete power and control retained by the grantor over the corpus and income of the trust fund during his life time constituted the instrument a mere recov-able expression of his intention as to the disposition of the prop-

erty upon his death, if the disposition made by him was not recalled before that event occurred. So long as that situation remained the entire trust fund was unquestionably taxable in Accomac county as the property of Mr. Kellam. The actual disposition of the property under the provisions of the deed could not take effect, if at all, except upon his death. His death having ocurred, without his having altered or revoked the deed, as a transfer intended to take effect in enjoyment after the donor's death. In Bullen v. State of Wisconsin, 240 U. S. 625, a resident of Wisconsin, by a deed of trust settlement quite similar to the deed in the instant case, transferred to a Chicago trust company a large fund invested in bonds, stocks, and notes, [fol. 27] and it was held that upon his death the corpus of the trust fund was subject to the inheritance or succession tax of Wisconsin. The court decided that the absolute power of control over all the gifts, evidenced by the right of entire revocation reserved by the donor, continued the ownership of the intangibles in the donor with the owner's dominion power of disposition.

The donor here having died without altering or revoking the deed, the gifts passed to the beneficiaries in accordance with the provisions of the deed, and they acquired such equitable estates as the deed conferred upon them.

In Carter v. Keesling, 130 Va. 655 real and personal property was given by a testator to his son, with a provision that if the son and daughter of his son should both die without issue, then the property should revert to the testator's other children. It was there held that the estate vested in the son was a defeasible fee in the real estate and a defeasible absolute estate in the personal property. In the instant case the two children took a defeasible absolute estate in this personal property, in equal shares except as varied by the difference in their ages, with the right of survivorship between them, defeasible as to each of them [fol. 28] upon dying before reaching twenty-five years of age without issue. There is no provision in the deed in terms covering the event that both beneficiaries should die under twenty-five and without issue. Whether the fund in such event would revert to the estate of the donor, or would pass to the estate of the survivor it is unnecessary now to determine.

The reported cases in Virginia show that it has been the policy of the State to impose taxes upon all intangible property, the ownership of which is traceable to a citizen or citizens of Virginia.

It has been repeatedly held that when a citizen and resident of this State has an equitable life estate in intangible personal property held in trust by a non-resident trustee or otherwise enjoys the usufruct of the property, the State can levy a tax upon the corpus of the fund, even though the fund has never been in Virginia. Brooklyn Trust Co. v. Booker, Com'r., 122 Va. 680; Wise, Trustee, v. Commonwealth, 122 Va. 693; and Elliott v. Commonwealth, 132 Va. 136.

Though the tax is assessed in the name of the trustee, the burden is in reality imposed upon the beneficial owner, [fol. 29] a resident of the Commonwealth who enjoys the protection of its laws along with other cotizens, and ought in fairness to contribute a due proportion of revenue for the support of the government. Selden v. Brooke, 104 Va. 832; and Elliott v. Commonwealth, supra.

It is insisted for the plaintiff in error that these cases are to be distinguished from the instant case, because in those cases the life tenant was actually determined and was in receipt of an annual income from the fund. The court, in these prior cases, however, declares the corpus of the fund to be taxable in Virginia, and not merely the interest of the life tenant nor the income. The person who was receiving the income was naturally the owner to whom the property should be assessed and who should pay the tax upon the corpus of the property. In the instant case the beneficiaries have no life estate merely; they have an absolute estate though there is a possibility of its subsequent defeasance and though the enjoyment of the estate in possession is postponed.

But without dwelling upon these features of the case, the actual situation is this—Mr. Kellam was the owner of the securities and the fund was taxable in Virginia as his property, during his life time. If his death did not effect a trans- [fol. 30] fer of the ownership for taxable purposes to his two sons, then his ownership was projected beyond his death, and the title and equitable right to the prop-rty passed to his personal representative until the two sons

became respectively twenty-five years of age. In that event the fund would be taxable in Virginia as part of Kellam's estate, certainly for the period mentioned.

The endeavor to adapt the ancient maxim mobili sequnter personam to intangible personal property, with reference to its situs for taxation, has produced great variety and some contrariety of opinion in this country, with its forty eight separate jurisdictions, and its great wealth of credit investments. We need not enter upon this limitless field of discussion.

We are satisfied that the intangibles in questions could not be relieved of taxation in Virginia by their removal to Baltimore and being put in the temporary possession of the trustee there for the purposes expressed in the trust deed. The material enquiry here is to whom they should be assessed and by whom the tax should be paid, and the answer should be consonant with fairness and in harmony with out tax laws. If an adult life tenant is in actual perception of the annuau income, it is a matter of indifference [fol. 31] to him whether the trustee pays the tax and deducts it from the income, or whether the life tenant pays it after receiving the gross income—as was said in Elliott v. Commonwealth, supra.

By reason of the postponement of the actual possession and use of the fund on the part of the beneficiaries under the trust provisions until they became twenty-five years of age, nothing comes into their hands during the intervening period out of which they should pay the tax. We see no reason why, in the case of these infant beneficiaries, the tax on intangibles should not be assessed to and paid by the trustee, who is under a duty to pay "such taxes as may be chargeable" on the property, though the trustee is non-resident. Under the statute the property may, in case of minors, be listed to the guardian or trustee; though in the case of an adult person or married woman it can only be listed to a resident trustee. In Wise v. Commonwealth, supra, the trust property held by a non-resident trustee was assessed to him and this assessment was upheld; since that decision however the statute has been changed so as to require the property to be assessed to the beneficiary, if not a minor, in such a case. In Taylor v. [fol. 32] Commonwealth, 124 Va. 445, intangibles owned

by a minor in Virginia were assessed at the residence of the minor against a non-resident guardian. The statute involved in that case, in so far as it relate to minors, was identical with section 2307, hereinbefore transcribed. It is apparent in the instant case that the assessment to the non-resident trustee will provide the more convenient and just method of taxing these intangibles, and will throw no obstacle in the way of collecting the tax.

The record in the case discloses that on May 3rd, 1920, Mr. Kellam executed a deed of trust to the Trust Company of Norfolk, Norfolk, Virginia, for the benefit of his two sons, quite similar though not identical with the deed to the Baltimore Company. This deed transferred to the trustee another separate list of securities $50,000.00 or more in value. These securities had been assessed against the Norfolk Trust Company and the tax paid by it regularly each year. When the securities in the possession of the Baltimore trustee were assessed for the first time in 1925, they were assessed against both trust companies jointly. For this reason the Norfolk company joined with the Baltimore company in the application to be exonerated from the payment of the tax.

[fol. 33] In the order entered by the trial court the facts relative to both deeds are recited, as also the qualification of Mrs. Kellam as the guardian, and the judgment of the court is stated as follows:

"Whereupon, it is considered by the court that the assessment of intangible personal property held by the Safe Deposit and Trust Company of Maryland, Trustee for L. J. and E. P. Kellam is erroneously assessed to the Trust Company of Norfolk, Trustee for L. J. and E. P. Kellam, it is ordered that such assessment be corrected and that the name of the Trust Company of Norfolk be eliminated therefrom.

"But the court being further of opinion that all such intangible property held under the trust aforesaid by the Safe Deposit and Trust Company of Baltimore, Maryland, for L. J. and E. P. Kellam is properly assessable with taxes by the Commonwealth of Virginia in Accomac county, it is ordered that the Assessment aforesaid be amended and corrected so that the names of the corporation and persons assessed with such taxes read as follows: The Safe

Deposit and Trust Company of Baltimore, Maryland, trustee for L. J. and E. P. Kellam, and Carrie P. Kellam, guar-
[fol. 34] dian of L. J. and E. P. Kellam."

In our opinion the court correctly ordered the name of the Norfolk company to be eliminated from the assessment of the Baltimore trust fund. While there is a liability to the Commonwealth for the payment of taxes in the aggregate on all the intangible personal property owned by these minors, there is no reason why separate assessments should not be made upon two funds under such severance of the two funds from the general property as appears here. In Taylor v. Commonwealth, supra, the court says:

"Further: Where the owner is a minor, idiot or lunatic, he is of course incompetent to list for taxation property owned by him, and alike incompetent to act as a payer of taxes. Hence, the statute in all such cases provides for some one else than the owner of the property to list it for taxation and to whom it shall be taxed. To provide a competent person to list the property for taxation and also to act as payer of the taxes thereon, who will be a person competent to give a correct list and one who, if not the owner, will be charged with a responsibility to the property owner in the premises, were, we think, the objects and purposes of the statute in designating by whom
[fol. 35] property of such persons is to be listed and to whom taxed, and not the making of the domicile of the former person the situs of the property for taxation."

In Wise v. Commonwealth, supra, the trust fund there in question was assessed separately against the non-resident trustee.

As a general rule the tax assessors should be left to act according to the circumstances in listing intangibles, especially of minors, as they can doubtless best judge of what comports with justice, convenience and practicability in assessing the tax at the situs and in the collection of the tax; unless constrained by statute.

In the second sentence from the extract of the order above transcribed, the court, having eliminated the Norfolk company, directs the assessment to be made in the

name of the Baltimore company and of the guardian jointly. The property should of course be assessed in Accomac county as the father and both sons resided there, but as the guardian had no control over the fund, and no portion of it nor of its usufruct could come into the possession of the guardian during the minority of her wards, it is not essential that she should be charged with the assess-
[fols. 36 & 37] ment and payment of the tax. Our opinion is that it should not be so assessed. It should rather be assessed against the trustee, under the peculiar circumstances here, who has laid upon it a direct obligation to pay all taxes chargeable upon the property.

The order of the trial court will therefore be amended by striking out from the concluding words of the second sentence, in the extract from the order, viz: "The Safe Deposit and Trust Company of Baltimore, Maryland, Trustee for L. J. and E. P. Kellam, and Carrie P. Kellam guardian of L. J. and E. P. Kellam," the words "and Carrie P. Kellam guardian of L. J. and E. P. Kellam." The assessment will thus remain against the Baltimore trust company, as trustee for the named beneficiaries of the trust.

As so amended the judgment is affirmed, with costs against the plaintiff in error.

Judgment amended and affirmed.

[fol. 38] In Special Court of Appeals of Virginia

[Title omitted.]

Petition for Rehearing

To the Honorable the Judges of the Special Court of Appeals of Virginia:

The petition of Safe Deposit & Trust Company of Baltimore, Maryland, a Corporation (hereinafter called Petitioner) prays that your Honours may allow it, the Petitioner, a rehearing in the above entitled matter, and for grounds of its prayer represents unto your Honours:

Since your Honours' decision was rendered on March 1, 1928, Petitioner has been advised that the tax involved in this case is subject to a further objection in that it is in-

consistent with the 14th Amendment to the United States Constitution and amounts to a deprivation of property without due process of law. This, though a matter of grave importance, involving substantial rights incommensurate with the pecuniary stake, yet does not appear from the record and briefs in this case ever to have been brought to the attention of the Trial Court, nor to have been urged before your Honours. Petitioner is advised and believes [fol. 39] that constitutional questions of the sort are of sufficient gravity, in order that justice may be done and the rights of the citizen defined, to merit presentation, argument and consideration, although tardily raised. Petitioner therefore prays that it may be reheard and that the question whether or not it has been deprived of property without due process of law may receive an express determination at your Honours' hands.

Other reasons leading Petitioner to ask for a rehearing will be urged hereinafter.

Question Presented

Where the corpus of a fund (consisting of securities) created by the deed of trust of a domiciled citizen and resident of Virginia, since deceased, is held by a non-resident Trustee upon trust to manage, to accumulate, not distribute, the income, and to pay one-half of the principal, including accumulated income, to each of the grantor's two sons upon his reaching the age of twenty-five, but, if either of the said sons die before receiving his share, to pay the same to his issue him surviving, or, if he leave no issue him surviving, then to add his said share to the original share of the surviv- [fol. 40] ing brother and to hold it for him in precisely the same manner as such original share, and neither of the grantor's said sons has died or attained the age of 25, has such corpus, so created and held, a taxable situs in Virginia within the sanction of Section One of the 14th Amendment to the Constitution of the United States?

Position of Petitioner

Asserting that the corpus of a fund so created and held has no taxable situs in Virginia, Petitioner questions and denies the validity of Section 2307 of Code of Virginia of

1919 (as amended) upon the ground that the said statute as interpreted in this case by the Circuit Court for the County of Accomac and the Special Court of Appeals of Virginia is repugnant to the Constitution of the United States, and more especially to section one of the Fourteenth Amendment thereto, and, furthermore, petitioner specially sets up and claims that by the imposition of the tax complained of it is denied a right, title, immunity, and privilege pertaining to it under the Constitution of the United [fol. 41] States and more especially under the amendment and section aforesaid, and is deprived of its property without due process of law.

(Counsel's Statement of Facts and Argument omitted.)

Petitioner therefore prays that it may be granted a rehearing in this matter, that the prayers of this, its petition, may be allowed and that the assessment against it may be ordered to be stricken from the books as unconstitutional and invalid and that, failing this, the 1921 assessment may be declared illegal as contrary to the statute of this Commonwealth in such case made and provided.

And petitioner will ever pray, etc.

Safe Deposit & Trust Company of Baltimore, Maryland, Petitioner, by Counsel. Leake & Buford, Littleton M. Wickham, and Wm. Pepper Constable, Counsel for Petitioner.

[fols. 42 & 43] In Special Court of Appeals of Virginia

[Title omitted]

Order Allowing Rehearing—May 26, 1928

On mature consideration of the petition of the plaintiff in error to set aside the decree entered herein on the 1st day of March, 1928, and grant a rehearing, the prayer of said petition is granted. It is therefore adjudged and ordered that the said decree be set aside and annulled, and this cause is ordered to be placed on the privileged docket to be heard at the next term of this court.

Which is ordered to be certified of the circuit court of Accomac county.

A copy. Teste:

H. Stewart Jones, C. C.

[fol. 44] IN SPECIAL COURT OF APPEALS

[Title omitted]

On Rehearing

OPINION BY JUDGE BEVERLEY T. CRUMP, PRESIDENT

October 30, 1928

A rehearing of the decision rendered in this case, on March 1, 1928, was allowed by the court upon the petition of the Safe Deposit and Trust Company of Baltimore, Maryland, trustee in the deed out of which the controversy arose. The application for rehearing was based chiefly upon the contention of this trustee that the ruling of the court allowing the State a right to assess a tax upon the corpus of the personal property in question rendered the Virginia statute, under which the assessment was made, repugnant to the Constitution of the United States and therefore void. Although no such constitutional question was brought to the attention of the court, and was therefore neither argued nor considered, upon the original hearing, the court is of opinion that we should consider and determine a question of such gravity, though raised for the first time in a petition for rehearing. The reargument was confined largely to the presentation of the views of the respective parties upon the [fol. 45] constitutional question involved. It was insisted by the trustee that the Virginia statute, as interpreted by the court, was violative of the provisions of section one of the Fourteenth Amendment, in that the imposition of the tax complained of was a denial of and abridged the privileges and immunities of the parties in interest, and deprived them of their property without due process of law. In support of these claims learned counsel maintained, as stated in their brief, the following propositions:

"(a) That a State, under 14th Amendment, can tax only that property of which it has jurisdiction,

"(b) That it has jurisdiction only of such property as is within its borders,

"(c) That the only theory upon which personal property, which, or the evidence of which, is physically situated without the State, can be held to be within its jurisdiction is that embodied in the Maxim, mobilia sequuntur personam.

"(d) That the rule is one of convenience merely, based upon the owner's presumed dominion over and enjoyment of the property, and embodies a legal fiction which yields to the facts of the case, and,

[fol. 46] "(e) That inasmuch as this fiction has so yielded in the case of tangible property generally, and also in the case of intangible property held by a non-resident trustee for a resident beneficiary who, although in reception of the income therefrom, has no control or dominion over the fund (this being true from the point of view both of property and succession taxation), therefore, a multo fortiori must it yield when the resident cestuis que trustent have neither possession, control nor the usufruct but have merely a contingent and future interest in the intangible property so held for them."

The assertions so made under (a) and (b) embody correct general principles of law. The positions assumed in (c) and (d) rest upon too broad a basis. It is a rule too generally acknowledged in our law of taxation to admit of doubt, that intangible personal property is and should be taxed to the owner or owners legal or equitable, although the written evidence of the chose in action, where such exists, is in another State. The maxim mobilia sequuntur personam is the firmly maintained governing principle by which the right of the State of the owner's domicile to levy the tax upon intangible personal property is to be [fol. 47] judged. While some of the cases, in dwelling upon the origination of the application of the maxim in this country, speak of it as one of convenience merely, and as embodying a legal fiction which may yield to the facts of the case, these observations are usually found in a line of cases defining the doctrine of business situs of intangible

property, where for example funds or securities are placed in the hands of an agent in another State for permanent use in a business, requiring their constant change and the absolute control of the agent over them; a doctrine with which we are not concerned here, and which is an acknowledged deviation from the general rule.

Discussion of the question of the situs of intangibles for taxation may be taken as now precluded by the decision of the Supreme Court of the United States in the case of Blodgett v. Silberman, (April, 1928), 48 Sup. Ct. Rep. 410, where the court says:

"At common law the maxim 'mobilia sequuntur personam' applied. There has been discussion and criticism of the application and enforcement of that maxim, but it is so fixed in the common law of this country and of England, in so far as it relates to intangible property, including choses in action, without regard to whether they are evidenced in writ- [fol. 48] ing or otherwise and whether the papers evidencing the same are found in the State of the domicil or elsewhere, and is so fully sustained by cases in this and other courts, that it must be treated as settled in this jurisdiction whether it approve itself to legal philosophic test or not.

"Further, this principle is not to be shaken by the inquiry into the question whether the transfer of such intangibles, like specialties, bonds or promissory notes, is subject to taxation in another jurisdiction. As to that we need not inquire. It is not the issue in this case. For present purposes it suffices that intangible personalty has such a situs at the domicil of its owner that its transfer on his death may be taxed there."

We cannot agree with either the premises or the conclusion appearing in the petitioner's proposition (e). The maxim above mentioned by the Supreme Court of the United States does not yield in the case of intangible personal property in which a resident beneficiary has solely a life estate or other partial interest in the corpus of a fund, but it does not apply because the corpus of the fund is not owned by residents of the State imposing the tax, and has never in any sense been within the jurisdiction of the taxing State.

[fol. 49] In the recent case of Brooke v. City of Norfolk, 48 Sup. Ct. Rep. p. 422, which apparently was decided at the same time the opinion in Blodgett v. Silberman, supra, was handed down, the court, in quite a brief opinion, passed upon this question, with no reference to the maxim. It was shown in that case that a resident of Maryland, by his will probated in Baltimore, bequeathed in trust to a Baltimore trust company a large fund the income upon which was to be paid to a resident of Virginia, and which was to go to certain persons, none of whom were residents of Virginia, at the death of the life tenant. The donor and all persons in interest, except the receiver of the income for life, were non-residents of Virginia, and no part of the trust property was or ever had been in Virginia. The State of Virginia required the person receiving the income for life to pay a tax upon the entire corpus of the foreign trust fund, although she paid the tax upon the income derived from this source. The court says:

"But the doctrine contended for now is that the petitioner is chargeable as if she owned the whole * * *.

"But here the property is not within the State, does not belong to the petitioner and is not within her possession or [fol. 50] control. The assessment is a bare proposition to make the petitioner pay upon an interest to which she is a stranger. This cannot be done. See Wachovia Bank & Trust Company v. Doughton, 272 U. S. 567."

The case of Wachovia Bank & Trust Company v. Doughton, referred to by the court as authority involved the validity of an inheritance or succession tax, but the decision was based upon the fact that the property passing in succession did not belong to the deceased life tenant and was never within the jurisdiction of the taxing State. A resident of Massachusetts by his will probated at his domicile in that State bequeathed to a trust company in the State a fund to be held in trust, the income to be paid to his daughter so long as she should live and at her death to be transferred to such persons as she should appoint by her will, with further provision in case of failure of such appointment. The daughter subsequently married and became a resident of North Carolina and by her will probated in the latter State exercised the power of appointment. North Carolina un-

der her law imposed a succession tax upon the value of the property passing to the appointees. It was held by the Supreme Court that the power of appointment was derived from the will of the donor and the right to its exercise fol-
[fol. 51] lowed only from the disposition of the property made in the Massachusetts will; that the assets of the trust estate had never been in North Carolina, and had no situs actual or constructive in that State: "The exercise of the power of appointment was subject to the laws of Massachusetts and nothing relative thereto was done by permission of the State where Mrs. Taylor (the daughter) happened to have her domicil. No right exercised by the donee was conferred on her by North Carolina. A State may not subject to taxation things wholly beyond her jurisdiction or control." The imposition of the succession tax was declared invalid.

On the other hand it is held in the case of a trust settlement by deed in which the donor reserves the right to revoke the trust during his life time, as in the instant case, the domiciliary State of the donor may impose a succession tax upon the trust fund on the death of the donor, as the establishment of the trust then becomes irrevocable, although the trustee holding possession of the intangibles constituting the trust fund is not a resident of the State in which the donor and beneficiaries are domiciled. Bullen v. Wisconsin, 240 U. S. 625; Saltonstall v. Saltonstall, 48 Sup. Ct. Rep. 225.

[fol. 52] In the latter case the court says:

"The present tax is not laid on the donor, but on the beneficiary; the gift taxed is not one long since completed, but one which never passed to the beneficiaries beyond recall until the death of the donor; and the value of the gift at that operative moment, rather than at some later date, is the basis of the tax."

The ownership and situs of the fund was necessarily in the domiciliary State of the donor and the beneficiaries, for purposes of taxation, pursuant to the maxim mobilia sequuntur personam, although the intangibles were in the possession of a foreign trustee, who held full legal title to them.

These recent cases establish indubitably that the fixed doctrine in the federal jurisdiction, by which we are governed in discussing a constitutional question, is that intangible personal property retains its situs for taxation at the domicil of the owner, although the physical evidence of the chose in action may be removed to another jurisdiction, and that when the situs and ownership of a fund consisting of intangibles are found to be in a certain State, another State does not acquire jurisdiction to tax the fund from the fact that a person enjoying the income for life [fol. 53] from the fund, is or becomes a resident of the other State.

These cases suggest and render material certain enquiries as to the facts of the instant case. Are there, in the instant case, any non-resident owners of the corpus of the trust fund, in remainder or otherwise? Does the assessment here require any persons to pay a tax upon property or an interest in property, to which they are strangers? Whose property is taken without due process of law? Are the owners of the trust fund in this case resident in Virginia?

The donor Kellam, domiciled in Virginia and a resident of Accomack county, desired to provide for the future of his two sons, after they should become respectively twenty-five years of age, and to that end determined to settle upon them in equal shares one hundred thousand dollars in securities, with the direction that the income should not be distributed but be allowed to accumulate. To accomplish this purpose he executed the two trust deeds in the record, one to the Norfolk Company in Virginia, the other to the Baltimore Company, assigning to the trustee in each deed securities approximately fifty thousand dollars in value. Under the terms of each deed one half of the trust fund [fol. 54] and its accumulated income was to be delivered to each of the beneficiaries as they became twenty-five years of age, with the proviso that if either of the sons should die unmarried and without issue prior to attaining the age mentioned the interest of that son should accrue to the survivor. Owing to the fact that the deeds stipulated that the donor reserved the right to revoke the trust and gifts, these deeds—as held in the Bullen case—only operated as transfers of the gift upon the death of the donor; the equitable ownership remained in the donor as long as he

lived, and hence a succession tax could be assessed against the corpus of the fund at his death. The securities passing to the Norfolk company were delivered to it, those passing to the Baltimore company were likewise delivered and removed to Baltimore. These transfers took place in Virginia. In the latter instance the situs of the intangible personalty was not changed by the removal of the physical evidences of the intangibles to another State. Each deed provided that the trustee should out of the income pay the taxes chargeable upon the fund. The securities in the Baltimore Company deed were assessable and taxable in Virginia as well as those transferred to the Norfolk company as trustee, as long as the donor lived. Doubtless if the donor had lived [fol. 55] for twenty years subsequent to these transactions, the trustee in Baltimore would have paid the tax in Virginia each year. Unfortunately he died three months after the execution of the two deeds of trust. Did his death result in any material change in the situation, other than making finally operative the gift provisions of the two deeds? It created no non-resident owners. There remained still the sole fact that the legal title to, and physical evidences of, the securities were with the Baltimore trustee. This is by no means determinative of the lack of jurisdiction in Virginia to tax the fund. In Blodgett v. Silberman, supra, the question was raised whether bonds and certificates of indebtedness of the United States, payable to bearer, deposited in a safe deposit box in New York City, and never removed from there, owned by the decedent at the time of his death, were intangibles coming within the rule of mobilia sequuntur personam. The argument was made that such bonds, transferable from hand to hand, had lost their character as choses in action, and had taken on the character of physical property. This argument was held unsound by the learned Chief Justice delivering the opinion, as follows:

"The question here is whether bonds, unlike other choses in action, may have a situs different from the owner's domi- [fol. 56] cil such as will render their transfer taxable in the State of that situs and in only that State. We think bonds are not thus distinguishable from other choses in action. It is not enough to show that the written or printed evidence of ownership may, by the law of the State in

which they are physically present, be permitted to be taken in execution or dealt with as reaching that of which they are evidence, even without the presence of the owner. While bonds often are so treated, they are nevertheless in their essence only evidences of debt. The Supreme Court of Errors expressly admits that they are choses in action. Whatever incidental qualities may be added by usage of business or by statutory provision this characteristic remains and shows itself by the fact that their destruction physically will not destroy the debt which they represent. They are representative and not the thing itself."

It can scarcely be maintained that the assessment of the trust fund here requires any one to pay a tax upon property, to which they are strangers, as that expression is used in Brooke v. Norfolk, supra; and hence without due process of law. It is argued that the estate given the two sons is merely a contingent interest in the property, and as such not taxable. It is certainly not technically con- [fol. 57] tingent. The proper construction of the deed is that it confers an absolute gift upon the two beneficiaries, subject to be divested upon a condition subsequent. If the deed be construed so as to require the trust to terminate in the event of the happening of the condition, that is, should both sons die without issue before attaining the age of the twenty-five, then there is a reversion to the estate of the donor. By analogy to the law of real estate the possible reversion is purely contingent, the prior gift to the sons vested. 1 Minor on Real Property, sections 171, 819.

It is urged in argument that the two sons are not owners of the property assessed for taxation, within the true meaning of the taxing statute. This presents a practical question rather than a legal one, in the instant case. The two sons are residents of Virginia, and administration upon the donor's estate could only take place in Virginia. Unless the two sons are owners, or in conjunction with the personal representative of the donor's estate they constitute the owners, then this fund has no ownership, and we have this large fund without any owner and existing in a non-taxable vacuum, until it is ascertained whether the condition subsequent is met. It is sometimes said that the law abhors a vacuum. Certainly we should not recognize [fol. 58] such a resultant situation here.

The court is of opinion that no non-residents are owners or have any interest in the corpus of the trust fund in Baltimore; that the present, and if essential, the ultimate owners of the property are residents of the State of Virginia; that the assessment in this case does not require any persons to pay a tax upon intangible personal property to which they are strangers.

We are further of opinion that both the owners and the *situs* of the intangibles in question have at all times been and still are within the jurisdiction of the State of Virginia, and therefore the assessment made in this case is not in any way violative of or repugnant to the 14th Amendment to the Constitution of the United States. The real problem is, how the property should be assessed, and who should be required to pay the tax. In the judgment rendered by the court this was solved by directing the trustee, who has temporary possession of the securities, to pay the tax, just as is now being done by the Norfolk trustee. This is in accordance with the terms of each of the deeds, and it seems to the court that this method carries out the original intention of the donor and is reasonably in conformity with the provisions of the statutes of Vir-
[fol. 59] ginia.

It is further insisted that the tax for the year 1921 should in any event be stricken out as invalid, because the failure to ascertain the lack of assessment for that year did not occur within three years prior to the time the assessment was made in January, 1925, in accordance with section 2332 of the Code. No such question was raised before the lower court; no assignment of error was made in this respect; and the record does not contain sufficient facts to enable this court to pass upon it intelligently. Therefore we cannot consider it.

For these reasons the court is constrained to adhere to the conclusions heretofore reached and to the judgment entered by the court thereon; and it will be so ordered.

Judgment affirmed.

[fol. 60] IN SPECIAL COURT OF APPEALS OF VIRGINIA

[Title omitted]

JUDGMENT—Oct. 30, 1928

This day came again the parties, by counsel, and the court having maturely considered the transcript of the record of the decree aforesaid and arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that there is no error in the decree appealed from. It is therefore adjudged, ordered and decreed that the said decree be affirmed, and that the appellants pay to the appellee thirty dollars damages, and also her costs by her expended about her defence herein.

[fol. 61] IN SPECIAL COURT OF APPEALS OF VIRGINIA

[Title omitted]

PETITION FOR APPEAL, ASSIGNMENT OF ERROR, AND PRAYER FOR REVERSAL

Petition for Appeal

To the Honourable the President of the Special Court of Appeals of Virginia:

Considering itself aggrieved by the final decision of the Special Court of Appeals of the Commonwealth of Virginia in the above entitled cause, the plaintiff therein, Safe Deposit and Trust Company of Baltimore, Maryland, hereby prays that an order be entered herein allowing it an appeal from the said final decision of the said Special Court of Appeals of Virginia to this Court and fixing the amount of the bond on said appeal.

Assignment of Error

And the said Safe Deposit and Trust Company of Baltimore, Maryland, assigns the following error in the record and proceedings in the said cause:

The said Special Court of Appeals of Virginia erred in so interpreting Chapter 104 of the Acts of Assembly of Virginia of 1923 (a copy of the pertinent provisions of which is attached hereto, marked "Exhibit A", and is to be taken and read as a part hereof) as to sustain its [fol. 62] validity and the validity of various taxes assessed thereunder by the Commonwealth of Virginia against the said Safe Deposit and Trust Company of Baltimore, Maryland, (a resident of the State of Maryland and a non-resident of the said Commonwealth of Virginia) upon the corpus of a fund (consisting of certain securities) created by an irrevocable deed of trust, the grantor in which, since deceased, was a domiciled citizen and resident of Virginia, and held by the said Safe Deposit and Trust Company of Baltimore, Maryland, upon trust to manage, invest and reinvest the same, to accumulate and not distribute the income therefrom, and to pay one-half the principal of the said fund and one-half the accumulated income to each of the grantor's two sons upon his reaching the age of twenty-five years, but, if either of the said sons should die before attaining such age, to pay his share to his issue him surviving, or, if he should leave no issue him surviving, then to add his said share to the original share of the surviving brother and to hold it for him in precisely the same manner as such original share, the said taxes being so assessed and imposed while neither of the grantor's said sons had died or attained the age of twenty-five years; and in so holding and deciding the said Special Court of Appeals of Virginia erred for the reason that the statute above cited, interpreted as aforesaid, is invalid and is repugnant to Section One of the Fourteenth Amendment of the Constitution of the United States in that the taxes assessed by virtue of the said statute deprive the said Safe Deposit and Trust Company of Baltimore, Maryland, of its property without due process of law.

Prayer for Reversal

For which error the said Safe Deposit and Trust Company of Baltimore, Maryland, prays that the said judgment of the Special Court of Appeals of Virginia dated the 30th day of October, 1928, in the above entitled cause, be reversed and a judgment rendered in favor of the said Safe

Deposit and Trust Company of Baltimore, Maryland, and for costs.

(Signed) Leake & Buford, William Pepper Constable, Littleton M. Wickham, Counsel for Safe Deposit and Trust Company of Baltimore, Maryland.

[fol. 63] Exhibit "A"

Chap. 104—An Act to Amend and Re-enact Section 2307 of the Code of Virginia, as Heretofore Amended

Approved March 26, 1923

1. Be it enacted by the general assembly of Virginia, That section twenty-three hundred and seven of the Code of Virginia be amended and re-enacted so as to read as follows:

Section 2307. By whom property is to be listed; to whom taxed.—If property be owned by a person sui juris, it shall be listed and taxed to him. If property be owned by a minor, it shall be listed by and taxed to his guardian or trustee, if any he has; if he has no guardian or trustee, it shall be listed by and taxed to his father, if any he has; if he has no father, then it shall be listed by and taxed to his mother, if any he has; and if he has no guardian, nor trustee, father nor mother, it shall be listed by and taxed to the person in possession. If the property is the separate property of a person over twenty-one years of age or a married woman, it shall be listed by and taxed to the trustee, if any they have in this State; and if they have no trustee in this State, it shall be listed by and taxed to themselves. In either case, it shall be listed and taxed in the county or city where they reside; but if they be non-residents of Virginia, the property shall be listed and taxed in the county or city wherein such trustee resides. If the property be the estate of a deceased person, it shall be listed by the personal representative or person in possession, and taxed to the estate of such deceased person. * * * If the property is held in trust for the benefit of another, it shall be listed by and taxed to the trustee in the county or city of his residence (except as hereinbefore provided) * * *

If the property consist of money, bonds, stocks, or other evidences of public or private debts in any county or city other than that of his residence, or State other than Virginia, it shall be listed by and taxed to the owner thereof; and it shall be the duty of the respective examiners of records of the several judicial circuits where the respective fiduciaries are appointed or qualified, to report to the respective commissioners of the revenues of the counties or cities in which said property is liable for taxation, all property held by said fiduciaries, to be taxed as provided by law. If the property be listed by and taxed to any person other than the owner, it shall not be delivered to the owner until [fol. 63a] the taxes thereon are paid or indemnity given to the person in possession, for the payment thereof.

[fol. 64] In Special Court of Appeals of Virginia

[Title omitted]

Order Allowing Appeal and Supersedeas

The Appellant in the above entitled cause having prayed for the allowance of an appeal to the Supreme Court of the United States from a judgment entered herein by the Special Court of Appeals of the Commonwealth of Virginia on the 30th day of October, 1928, and from each and every part thereof, and having on this 15th day of December, 1928, presented and filed its petition for appeal, assignment of error and prayer for reversal pursuant to the Statutes and the Rules of the Supreme Court of the United States in such case made and provided.

It is now here ordered that an appeal be, and the same is, hereby allowed to the Supreme Court of the United States from the Special Court of Appeals of the Commonwealth of Virginia in the above entitled cause as provided by law and, further, that the Clerk of the said Special Court of Appeals shall prepare and certify a transcript of the record proceedings and judgments in this cause and transmit the same to the Supreme Court of the United States, so that he shall have the same in the said Court within 30 days from the date hereof.

And it is further ordered that upon the giving by the Appellant, or some one for it, of a bond in the sum of Fifteen Hundred dollars ($15,000.00) as security for damages and costs, with surety to be approved by the Clerk of the [fol. 65] said Special Court of Appeals, the mandate of the said Special Court of Appeals shall be stayed until final judgment be rendered on this appeal, unless the Appellant shall fail to perfect its appeal within 30 days from the date hereof.

Dated this 15th day of December, 1928.

Beverley T. Crump, President Special Court of Appeals of Virginia.

[fol. 66] Bond on appeal for $1,500, approved and filed December 15, 1928, omitted in printing.

[fol. 67] Citation, in usual form, showing service on Leon M. Bazile, omitted in printing.

[fol. 68] In Special Court of Appeals of Virginia

[Title omitted]

Stipulation as to Contents of Transcript of Record

It is stipulated and agreed by and between counsel for the Appellant and counsel for the Appellee that in preparing the transcript of the Record for transmission to the Supreme Court of the United States, the Clerk of the Special Court of Appeals of Virginia shall include in the said transcript the following:

(a) The Record in the Circuit Court for the County of Accomac, but omitting therefrom from and including the words "Copy of Trust Deed" on page 21 of the printed Brief and Petition for Writ of Error through and including the words "A. W. Brock, Secretary" on page 24 of said printed Brief and Petition, and substituting for such

omitted matter the words (Copy of Deed of Trust to Trust Company of Norfolk Omitted);

(b) The Petition of Appellant for a Writ of Error to the Circuit Court for the said County, but omitting therefrom from and including the words "Important Facts" on page 1 of the said printed Brief and Petition through and including the words "at the age of twenty-five years" on page 13 thereof, and substituting for such omitted matter the words (Counsel's Statement of Facts and Argument omitted).

(c) The Petition of Appellant for Rehearing in the Special Court of Appeals of Virginia but omitting therefrom from and including the word "Argument" on page 4 [fol. 69] of the said Petition through and including the words "opportunity to appeal" on page 47 thereof, and substituting for such omitted matter the words (Counsel's Statement of Facts and Argument omitted);

(d) All orders and opinions of the Special Court of Appeals of Virginia herein entered;

(e) Appellant's Petition for Appeal, Assignment of Errors, and Prayer for Reversal;

(f) Order allowing Appeal;

(g) Appeal and Supersed-as Bond;

(h) This Stipulation.

It is further stipulated and agreed, but without any admission on the part of the Appellant of the relevancy of the fact, that the beneficiaries under the deed of trust of which the copy is omitted under (a) above, and their interests under the said deed, are identical with those under the deed of trust to Appellant.

Signed this 14th day of December, 1928.

Leake & Buford, Littleton M. Wickham, Counsel for Appellant. Leon M. Bazile, Assistant Attorney-General; W. W. Martin, Counsel for Department of Taxation, Counsel for Appellee.

[fol. 70] Triplicate certificate omitted in printing.

[fol. 71] SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION OF PARTS OF THE RECORD TO BE PRINTED—Filed Jan. 9, 1929

Comes now the Appellant and adopts its Assignment of Error, with the exhibit thereto attached, as its statement of the points to be relied upon.

Come now also Appellant and Appellee by counsel and represent that the whole of the Record, as filed, is necessary for the consideration of the case except as follows:

Title of paper	Record page
Petition for Appeal and Certificate	1 and 2
Orders of course of Special Court of Appeals	19, 37, 43

Joseph M. Hurt, Jr., Leake & Buford, William Pepper Constable, Littleton M. Wickham, Counsel for Appellant. Leon M. Bazile, Assistant Attorney-General; W. W. Martin, Counsel for Department of Taxation, Counsel for Appellee.

[fols. 72 & 73] Service of the above with full effect as if made by the United States Marshal, accepted this 8th day of January, 1929.

Leon M. Bazile, Assistant Attorney General; W. W. Martin, Counsel for Department of Taxation, Counsel for Appellee.

Endorsed on cover: File No. 33,927. Virginia Special Court of Appeals. Term No. 618. Safe Deposit and Trust Company of Baltimore, Maryland, appellant, vs. The Commonwealth of Virginia. Filed January 9th, 1929. File No. 33,927.

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STATEMENT AS TO JURISDICTION ON APPEAL WITH ACKNOWLEDGMENT OF SERVICE.

Supreme Court of the United States

OCTOBER TERM, 1928.

No. ~~[illegible]~~ 20

SAFE DEPOSIT AND TRUST COMPANY OF BALTIMORE, MARYLAND,
APPELLANT,

vs.

THE COMMONWEALTH OF VIRGINIA. APPELLEE.

APPEAL FROM THE SPECIAL COURT OF APPEALS OF THE STATE OF VIRGINIA.

J. JORDAN LEAKE,
A. S. BUFORD, JR.,
LITTLETON M. WICKHAM,
WILLIAM PEPPER CONSTABLE,
JOS. M. HURT, JR.,
Counsel for Appellant.

(33,927)

Supreme Court of the United States

OCTOBER TERM, 1928.

No. 618.

SAFE DEPOSIT AND TRUST COMPANY OF BALTIMORE, MARYLAND,
APPELLANT,

v.

THE COMMONWEALTH OF VIRGINIA. APPELLEE.

STATEMENT AS TO JURISDICTION ON APPEAL.

May it please the Court:

The Appellant, in support of the jurisdiction of this Court to review the above entitled cause on appeal, respectfully represents:

A.

Act, Feb. 13, 1925, c. 229, sec. 1, 43 Stat. 937, (U. S. C., Tit. 28, Judicial Code and Judiciary, sec. 344, par. [a]).

Act, Jan. 31, 1928, c. 14, sec. 1, 45 Stat. ; Act. Apr. 26, 1928, c. 440, 45 Stat. , (U. S. C., Tit. 28, Judicial Code & Judiciary, secs. 861-1 and 861-2).

B.

(*All references are to the pages of the printed record.*)

The judgment sought to be reviewed was rendered on the 30th day of October, 1928, *vide* Transcript of Record, pp. 21 and 30.

Appellant's Petition for appeal was presented to the President of the Special Court of Appeals of Virginia on the 15th day of December, 1928, *vide* Transcript of Record, page 33.

C.

The statute quoted on pages 32 and 33 of the Record is the general assessment law for this Commonwealth. As summarized in the first opinion of the Lower Court (Record, p. 12) the last section quoted fixes the *situs* for taxation of stocks and bonds in any state other than Virginia; while the earlier portion of the quotation determines to whom, amongst various classes of owners or their fiduciaries, the property shall be assessed and taxed. The provision regarding *situs*, spoken of above, is as follows:

> "If the property consists of money, bonds, stocks, or other evidences of public or private debts in any * * * State other than Virginia, it shall be listed by and taxed to the owner thereof."

Thus much for the applicable statute. The facts are as follows: the property consists of various stocks

and bonds (Record, pp. 7, 8) as the same may have been changed by reinvestment by Appellant and the evidences of such property have been continuously in the possession of the Appellant and without this Commonwealth since the inception of the trust (Record, p. 4). The jural relationship of Appellant's *cestuis que trustent* to the said property is wholly defined and controlled by the terms of their father's trust deed, set out in the Record on page 5, *et seq.*, the pertinent provisions of which are as follows:

> "To Be Held by said Safe Deposit and Trust Company of Baltimore upon trust to collect the income arising therefrom and after paying such taxes as may be chargeable thereon and its 5% commissions on the gross income, to accumulate the net income for the benefit of the two sons of myself, that is to say, Lucius J. Kellam, Jr., who attained the age of eight years on September 25, 1919, and Emerson Polk Kellam, who attained the age of five years on February 5, 1920, and when the said Lucius J. Kellam, Jr., arrives at twenty-five years of age, to deliver to him one-half of the principal of the estate hereby conveyed and one-half of the said accumulations of income—the other half of the said principal and accumulations of income shall be retained by said Trustee and all income therefrom shall continue to be accumulated until the said Emerson Polk Kellam arrives at twenty-five years of age when he shall become entitled to the said one-half of the principal and accumulations so retained together with all further accumulations thereon. If either of said two sons shall die before receiving his share of said principal and accumulations, then the same shall be paid over and delivered to his children living at his death; and if either shall die before receiving his share without issue, then such share shall be added to the share of the survivor and be held for his use and benefit in the same manner precisely as his original share is held."

The dates given in the foregoing quotation make it plain that both *cestuis* are yet under age, and reference to pp. 6 and 7 of the Record will show that the trust became irrevocable upon their father's death.

In its Petition for Rehearing the Appellant expressly raised the point that as interpreted in this case by the Special Court of Appeals the statute was repugnant to the due process clause of the 14th Amendment of the Constitution of the United States (Record, pp. 19, 20), and the rehearing was granted in order that the question might be determined (Record, p. 21). The decision was adverse to Appellant (Record, p. 30), it being held (Record, p. 29) that the assessment was in no wise unconstitutional.

Appellant therefore contends that if the word "owner", appearing in the foregoing quotation from the statute be correctly interpreted to include persons in the position of Appellant's *cestuis* with regard to the property involved (and that it *is* correctly so interpreted is the decision of the lower Court in this case, then under the facts of this case the statute is repugnant to the Constitution as aforesaid, and it, and the assessment made in accordance with it, are, *quoad hoc,* unconstitutional and void.

D.

The following decisions of this Court are believed to sustain jurisdiction of this Appeal.

Dahnke-Walker Co. v. *Bondurant* (1921), 257 U. S. 282, 288.

Cudahy Packing Co. Etc. v. *Parramore* (1923), 263 U. S. 418, 422.

Fiske v. *State of Kansas* (1926), 274 U. S. 380, 385.

It is therefore respectfully submitted that this Court has jurisdiction of this Appeal.

J. JORDAN LEAKE,
A. S. BUFORD, JR.,
LITTLETON M. WICKHAM,
WILLIAM PEPPER CONSTABLE,
JOS. M. HURT, JR.,
Counsel for Appellant.

ACKNOWLEDGMENT OF SERVICE.

Service of the foregoing Statement as to Jurisdiction on Appeal, with full effect as if made by a Marshal of the United States, is accepted this 1st day of February, 1929.

LEON M. BAZILE,
Assistant Attorney-General.
W. W. MARTIN,
Counsel for Department
of Taxation.
Counsel for Appellee.